No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF OCCASIONED BY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. Robert Brame, III
901 East Cary Street
Richmond, VA 23219
(804) 775-4305

General Counsel
Republican Party of Virginia

Patrick M. McSweeney
11 South 12th Street
Richmond, VA 23219
(804) 783-6802

Chairman
Republican Party of Virginia

Daniel A. Carrell
951 East Byrd Street
Richmond, VA 23219
(804) 788-8297

Donald W. Lemons
600 E. Main Street
Richmond, VA 23219
(804) 780-0505

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE
901 East Cary Street
Richmond, VA 23219
(804) 775-4319

Counsel for Appellees

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

STATUTES

No. 94-203

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW,
AND KIMBERLY J. ENDERSON,
APPELLANTS,

v.

REPUBLICAN PARTY OF VIRGINIA AND
ALBEMARLE COUNTY REPUBLICAN COMMITTEE,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF OCCASIONED BY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Appellees, The Republican Party of Virginia and The Albemarle County Republican Committee (collectively, "the Party") submit this supplemental brief, pursuant to Rule 18.9 of the Rules of the United States Supreme Court, in response to the Brief of the United States as Amicus Curiae.

INTRODUCTION

Rather than present the Court with an examination of the important constitutional and administrative ramifications posed by the Appellants' (collectively, the "Law Students") expansive interpretation of the Voting Rights Act, 42 U.S.C. § 1973c (the "Act"), the United States merely adopts and repeats their arguments and analysis to such an extent that it may as well have placed a grey cover on the Law Students' brief. Not only is the Government's brief free of original analysis, but it is even unwilling to part company with the Law Students when they propose a private cause of action to challenge alleged poll taxes under Section 10 of the Voting Rights Act. This Court recognized such a right under the Fourteenth Amendment almost 30 years ago in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). What possible benefit could flow from a forced reading of Section 10 to create a duplicate remedy before a three judge court? There is no sign that the Government has independently evaluated this or other serious policy implications of the position advanced by the Law Students.

The position taken by the Government on the question of preclearance is even more radical. The Act by its terms applies to "voting," and "voting" is defined as "all action necessary to make a vote effective in any primary, special or general election . . ." 42 U.S.C. § 1973l(c)(1). There is a good reason why the sweep of the Act should fall short of party conventions. Whenever states have tried to regulate conventions they have been brought up short by the First Amendment.

The Government articulates no reason why the First Amendment should operate differently on acts of Congress. It is one thing for a party litigant in an adversarial process to minimize the constitutional infirmities of their position, but it is disappointing that an amicus would simply deny that serious constitutional issues are implicated.

Similarly, it is difficult to understand how an amicus can simply deny that grave issues of "workability" arise from the Law Students' position. If the Law Students are correct that an increased fee requires preclearance, then does this not prove too much? Would not every change in location of a mass meeting or a change in rules governing procedure require preclearance? The Government has not hazarded whether it has the resources to preclear such matters from Virginia's 136 cities and counties. The Republican Party of Virginia knows that neither it nor its local volunteers possess such resources.

Due to the great similarity between the United States' brief and that of the Law Students, including the authorities cited, organization and the arguments advanced, the Party will not burden the Court with fully restating its points and authorities as described in its Motion to Affirm or Dismiss. The Party does offer for the Court's further consideration the questions of constitutional liberty, policy and practicality not pursued by the amicus.

DISCUSSION

I. THE UNITED STATES FAILS TO ADDRESS THE CONSTITUTIONAL AND ADMINISTRATIVE IMPLICATIONS POSED BY INTRUDING INTO THE FUNDAMENTAL RIGHTS OF FREE POLITICAL ASSOCIATION IMPLICIT IN THE CONSTRUCTION OF THE ACT ADVANCED BY THE LAW STUDENTS.

The United States argues that the Voting Rights Act must extend to the selection of convention delegates by the Party, because otherwise, "political parties" might be able to engage in some hypothetical act of racial discrimination in the indeterminate future. There is, of course, no hint or even suggestion that this case involves racial discrimination. Indeed, in an effort to exalt metaphor over fact, the Law Students have argued in their brief that the convention was so inclusive that it became a de facto primary. J.S. at 3. In the face of such an open and widely attended convention, the United States' profession of abstract and hypothetical fears does not warrant disregarding the plain language of the Act and all applicable case authority or justify intrusion into the internal rule-making decisions of a political party with the very real constitutional questions and administrative burdens posed by such action.

As this Court aptly pointed out in *Presley v. Etowah County Com.*, 502 U.S. 491, 112 S.Ct. 820, 832 (1992), the "Voting Rights Act is not an all-purpose anti-discrimination statute." Section 5 of the Act was specifically designed to protect against certain evils.

The Act precludes any change in "voting qualification or prerequisite to voting, or standard, practice or procedure" aimed at "denying citizens their right to vote because of their race." *Presley*, 112 S.Ct. at 827. In apparent recognition of the First Amendment's guaranties, Congress specifically limited the Act by defining "voting" in terms of an election. The Voting Rights Act specifically defines "voting" to include ". . . all actions necessary to make a vote effective in any primary, special or general *election* . . ." 42 U.S.C. § 1973p (emphasis added). The Party's rule requiring a filing fee for delegates to its convention simply and obviously does not affect a citizen's right to vote in an election. As the Court has explained, Section 5 "is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Id.* at 832. Thus, the court below correctly held that the Party's registration fee did not trigger Section 5 of the Act.

The Court's decisions concerning the right of association guaranteed by the First and Fourteenth Amendments to participants in political parties further confirms the limited reach of the Act into the affairs of a political party. The Court has upheld the right of political parties to establish the rules governing their proceedings. *Tashjian v. Republican Party*, 479 U.S. 208, 216 (1986); *Cousins v. Wigoda*, 419 U.S. 477 (1975). The Court has also consistently struck down any attempt by a State to regulate the internal affairs of a political party. *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981); *see Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 227 (1989) (State may not prevent parties from

taking internal steps affecting their own process for selection of candidates). The Court ruled in *O'Brien v. Brown*, 409 U.S. 1 (1972) (per curiam), that the right of association protected by the First Amendment prevents the government from regulating the selection of convention delegates.

The United States simply glosses over the constitutional implications of its position by leaping to the conclusion that the Party was performing a "public electoral function," thereby subjecting its freedom of association interests to the requirements of the Fifteenth Amendment. Br. for the U.S. as Am. Cu. at 14-15. The United States reasons that the Party's delegate filing fee implicated the "public electoral function" because it is part of the "selection process [which] is a 'part of the machinery for choosing [government] officials' whether it occurs at a convention or at a primary election." Br. for the U.S. as Am. Cu. at 11 (citations omitted).

It is true that Section 5 of the Act applies to a political party to which the State has delegated authority to make rules for the conduct of primary elections. *See e.g. MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972). The theory underlying this extension of Section 5 is that no State should be permitted to bypass the requirements of the Act by delegating its authority to a political party. Id. A political party, however, is not the creature of the State, and the freedom of association guaranteed by the First and Fourteenth Amendments includes political parties.

Under amicus' analysis, every action taken by a political party not expressly limited to platform drafting would satisfy the "public electoral function" because it could "affect" for whom a citizen ultimately gets to vote. Amicus not only fails to offer a principled basis for distinguishing between a rule requiring preclearance of the fee at issue and a requirement to preclear a party's internal rules and procedures in general,[1] it assumes that a wholesale intrusion by the government into the details of party governance presents no substantial constitutional issue.

Of course, if the Attorney General of one party were to delay the nominating convention of the other party for 60 days while passing on its associated fees and rules, an absurdity of constitutional dimensions would result. One very real difficulty in the United States' position is the fact that final approval of a convention's rules does not occur until after it has been convened and has adopted its permanent rules. Under the United States' premise, the convention would have

---

[1] The Government tacitly acknowledges that it "may be difficult in some cases to determine whether a party rule relates to a public electoral function ..." However, it provides no rational basis for doing so, because there is none. Br. for the U.S. as Am. Cu. at 15. The Government merely states that the difficulty in fashioning a line of demarcation from those rules that implicate the electoral function and those that do not, "is no reason to hold such rules are free from scrutiny..." *Id.* What the Government fails to acknowledge is once the Act is construed as regulating any internal rule of a political association, all rules are implicated. Neither the language of the Act nor sound policy support this result.

to come to a halt for at least 60 days, while preapproval was sought and obtained for any rule change. *See* 42 U.S.C. § 1973c. It is precisely to avoid constitutional infirmity that the Act restricts itself to state action. Here no such state action can be found.

Amicus, however, argues that the Party "is 'acting under authority explicitly . . . granted by' Virginia," as required by 28 C.F.R. 51.7(b), because §§ 24.2-101 and 24.2-509(A) Va. Code Ann. provide that parties are free to choose how they will nominate their candidates. If a law purporting to alter party rules governing candidate selection would be unconstitutional, as it certainly would be, *see Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989), then a statute recognizing the right of the party to set its own rules is hardly a delegation of a state power or function.

The statutes upon which the Solicitor General relies are simply declarative of what would be the law in the absence of the statute. The ordinary and natural reading of them is that Virginia acknowledges the Party's autonomy rather than that Virginia delegates any power. Accord, Letter of James S. Gilmore, III to Drew S. Days, III. (Attachment).

Finally, this Court has clearly stated that it will not adopt unworkable voting rights procedures. *Presley*, 112 S.Ct. at 830 (recognizing necessity to "formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting"). If the fee at issue here is

deemed to affect voting so as to require preclearance, why not the time, place and manner of conducting a mass meeting or convention in each of Virginia's localities?

The United States has provided no basis for concluding that the Justice Department is adequately equipped to handle the overwhelming burden which would be placed upon it should it have to preclear party rules. What is known is that grass roots volunteers who attend mass meetings in Virginia's fire stations, auditoriums and hotel meeting rooms are in no position to preclear anything and that the Party, as a volunteer entity, cannot undertake such effort across the Commonwealth even if preclearance were conceptually possible for all convention rules.

II. SECTION 10 OF THE VOTING RIGHTS ACT DOES NOT SUPPORT A PRIVATE RIGHT OF ACTION.

The United States has adopted wholeheartedly the Law Students' mistaken premise that one of the purposes of the Act under Section 10 was to outlaw poll taxes. It then leaps to the conclusion that the Court's decision in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), which established a private right of action under Section 5 of the Act, compels the conclusion that a private right of action also exists under Section 10 of the Act. The United States, as do the Law Students, completely overlooks the plain, and explicitly limited, language of Section 10. That section provides only for the Attorney General to exercise her

discretion in attacking *certain* poll taxes which have since been swept away en masse.

The obvious fallacy of the United States' position is exposed by its statement that "the provision in Section 10 authorizing enforcement of Section 10 by the Attorney General should be construed as giving her power to enforce 'what might otherwise be viewed as 'private' rights.'" Br. for the United States As Amicus Curiae at 17-18 (quoting *Allen*, 393 U.S. at 555 n.18). As the Party pointed out in its Motion to Affirm or Dismiss at 16-17, the Court in *Harper, supra*, held, after the Act was enacted, that there existed a private cause of action, outside of the Act, for poll tax violations.

Since persons already have a private right of action for poll tax violations, the entire ameliorative effect of the Act under the United States' construction of Section 10 is to merely provide a claim before a three judge court, with the associated right of direct appeal to this Court, in addition to the already existing right to pursue a private cause of action under the Fourteenth Amendment before a federal district judge with review in the Circuit Court of Appeals. There is simply no reason advanced by anyone to disregard ordinary rules of statutory construction to arrive at an unneeded remedy for a practice that was abolished more than a generation ago. Such metaphysical disputes may hone the faculties of the Law Students but present no substantial issues for this Court's review.

CONCLUSION

Given that the concerns expressed by the amicus are wholly speculative and abstract, and that the burdens and dangers associated with its position are immediate and concrete, there is no reason why the Court should depart from the plain meaning of the Act which limits its coverage to voting in elections. The Court should, therefore, summarily affirm the well-reasoned decision of the three-judge district court or dismiss the appeal.

Respectfully submitted,

J. Robert Brame, III
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-4305

Patrick M. McSweeney
11 South 12th Street
Richmond, VA 23219
(804) 783-6802

General Counsel
Republican Party of Virginia

Chairman
Republican Party of Virginia

Daniel A. Carrell
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8297

Donald W. Lemons
600 E. Main Street
Richmond, VA 23219
(804) 780-0505

E. Duncan Getchell, Jr., *Counsel of Record*
Robert L. Hodges
McGUIRE, WOODS, BATTLE & BOOTHE, L.L.P.
One James Center
901 E. Cary Street
Richmond, VA 23219
(804) 775-4319